

Susan Parker Bodine
(202) 371-6364
susan.bodine@btlaw.com

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Via regulations.gov and U.S. Mail

Water Docket
U.S. Environmental Protection Agency
Mail code: 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attention: Docket ID No. EPA-R03-OW-2010-0736

**Re: EPA-R03-OW-2010-0736
Draft Chesapeake Bay Total Maximum Daily Load**

Dear Sir or Madam:

The agricultural and forestry organizations listed below respectfully request the U.S. Environmental Protection Agency (EPA) to withdraw its draft Chesapeake Bay Total Maximum Daily Load released for public comment on September 24, 2010. 75 *Fed. Reg.* 57776 (Sept. 22, 2010) (Docket Number EPA-R03-OW-2010-0736) (hereinafter Draft TMDL). If EPA does not withdraw the Draft TMDL, we request EPA to make all relevant information regarding the models EPA relied on to develop the TMDL available to the public and to provide the public with 120 days to review and comment on the Draft TMDL after this information is made available in the docket.

Joining this request are: Agricultural Retailers Association, American Farm Bureau Federation; American Meat Institute; Michigan Agri-Business Association; Missouri Agribusiness Association; Mosaic Fertilizer; National Alliance of Forest Owners; National Association of Wheat Growers; National Cattlemen's Beef Association; National Council of Farmer Cooperatives; National Milk Producers Federation; National Pork Producers Council; PotashCorp; South East Dairy Farmers Association; The Fertilizer Institute; United Egg Producers, USA Rice Federation; Virginia Agribusiness Council; Virginia Grain Producers Association.

These organizations – or their members – own and operate lands and facilities that produce or contribute to the production of the row crops, livestock, and poultry that provide safe and affordable food, fiber, and fuel to Americans all across the United States. Some of these operations are located on or near waters of the United States, and some fall within the 64,000 square mile Chesapeake Bay watershed. These operations include those that hold individual and/or general permits for the discharge of pollutants into water; operations that are participants

in nutrient management programs supported by state departments of agriculture or by the U.S. Department of Agriculture; and operations that undertake voluntary action to control runoff of nutrients and sediments without participating in or reporting to a formal state or federal program. Members with operations located in the Chesapeake Bay watershed would be directly affected by EPA's Draft TMDL. In addition, the undersigned have a direct interest in any precedents that EPA may establish that may have national implications with respect to federal control over TMDLs and TMDL implementation.

We believe that EPA should withdraw the Draft TMDL and instead work with the states in the Chesapeake Bay watershed and the District of Columbia (Chesapeake Bay jurisdictions) to develop TMDLs in 2011 for tidal waters in the Chesapeake Bay watershed impaired by nutrients and sediments. This delay will allow EPA to gather more data to correct errors in the Chesapeake Bay Watershed model relating to assumptions regarding nutrient use and management as well as suburban land characteristics. *See* letter dated June 11, 2010, from Shawn Garvin, Regional Administrator, EPA Region III, to the Principal's Staff Committee (discussing plans to update the model to address these flaws). Given its significance, the Scenario Builder model also should be subject to peer review.

Withdrawing the Draft TMDL will not only allow EPA to gather more data, correct deficiencies in its modeling, and perform a peer review, it also will allow EPA to take action on changes to water quality standards proposed by the State of Maryland and the Commonwealth of Virginia. In the Draft TMDL, EPA is presenting two sets of allocations, one based on current water quality standards and another based on anticipated changes to Maryland and Virginia standards. In addition, in 2011 EPA anticipates that it will have sufficient data to evaluate whether the dissolved oxygen criteria it is using are protective. *See* Draft TMDL, App. D, at 1.

If EPA refuses to withdraw the Draft TMDL, at a minimum EPA must make available for public review the code for the "Scenario Builder" model that provides inputs to the Chesapeake Bay Watershed model. EPA is relying on the "Scenario Builder" model to determine the assumptions under which the Chesapeake Bay Watershed Model predicts that water quality standards will be met. EPA then incorporated those assumptions into the Draft TMDL. *See* Draft TMDL, section 8 and Appendix H.

Scenarios representing different nutrient and sediment loading conditions were run using the Chesapeake Bay Phase 5.3 Watershed Model and the resultant model scenario output was fed as input into the Chesapeake Bay Water Quality Model to evaluate the response of critical water quality parameters, specifically dissolved oxygen, water clarity, underwater bay grasses and chlorophyll *a*.

Draft TMDL, Appendix H, at 1. Despite its significance, and unlike the Chesapeake Bay Watershed Model, the Scenario Builder code is not available to the public. In addition, while EPA may have provided the Scenario Builder inputs and outputs to watershed jurisdictions, there is no reference or link to this information in the Draft TMDL. *See* <http://ches.communitymodeling.org/models/CBPhase5/index.php> (noting scenario data and phase 5 scenario results are "coming soon") (accessed October 15, 2010). EPA's failure to make adequate information about this important model available for public review is a violation of 40 C.F.R. 130.7(c)(1)(ii), which requires that calculations used to establish TMDLs be subject to public review, as well as a violation of the Administrative Procedure Act.

After EPA makes this information available, we respectfully request EPA to provide 120 days for the public to review and comment on the Draft TMDL.

EPA acknowledges that the "Chesapeake Bay TMDL is the largest, most complex TMDL in the country, covering a 64,000-square-mile area in seven jurisdictions." Draft TMDL, at 2-7. As noted above, EPA is proposing two separate sets of load allocations and waste load allocations for three pollutants in 92 water body segments (one set to meet current water quality standards and one set to meet proposed water quality standards that may or may not be approved by the time the TMDL is issued). Thus, the Draft TMDL consists of 552 separate TMDLs.

These TMDLs include allocations for 1,006 individual residences, by individually naming the homeowners in Appendix Q. The Draft TMDL also threatens to impose allocations on small entities that raise one or more animals, but are not large enough to require a permit under the Clean Water Act. According to the U.S. Department of Agriculture, in 2002 there were a total of 111,692 livestock operations of all sizes in Virginia, West Virginia, Maryland, Delaware, Pennsylvania, and New York. In 2001, EPA estimated the total number of animal feeding operations with 300 animal units or more in these states to be 4,360. While these are statewide numbers, and the number of operations in the Chesapeake Bay watershed will be smaller, these numbers indicate that a very large number of small livestock operations could be affected by the Draft TMDL. At this point, the potentially affected small farms are not individually listed in the Draft TMDL, but the threat to subject them to federal regulation is there.

Further, the Draft TMDL that EPA made available for review on September 24, 2010, consists not only of these wasteload and load allocations, but also consists of detailed implementation instructions directed at the watershed jurisdictions. Thus, the Draft TMDL consists not only of the 370 pages of the Draft TMDL document, but also the 1,672 pages of the 22 appendices, as well as the technical analysis and modeling information that is referenced throughout the draft TMDL. We have not attempted to quantify the volume of that supporting information.

Despite its acknowledgement that the Draft TMDL is the most complex ever attempted, EPA is allowing only 45 days for public comment. We believe that 45 days is insufficient under the Administrative Procedure Act to provide for meaningful public comment on the Draft TMDL by any entity, and particularly by the homeowners and small animal feeding operations who may be completely unaware of this effort to federally regulate them. Accordingly, if EPA does not withdraw the Draft TMDL, as requested above, we request a 120 day comment period beginning on the date that EPA makes available for public review the code for, the inputs to, and the outputs from the Scenario Builder model.

We are aware that EPA signed a settlement agreement with the Chesapeake Bay Foundation (CBF) agreeing to finalize a TMDL for nutrients and sediment for the Chesapeake Bay watershed by December 31, 2010. We respectfully submit that such a schedule would fail to provide for meaningful public comment. Further, this date is embodied in a settlement agreement, not a judicial consent decree, so EPA need only seek an extension from CBF. Even if the CBF is unwilling to agree to a modification of the settlement agreement, the only remedy CBF has under that agreement is to reinstate its lawsuit against EPA, which we believe is without merit. Further, if EPA makes the requested information relating to Scenario Builder available to the public quickly, the Agency will still be able to issue the 23 TMDLs in Virginia and the 2 TMDLs in the District of Columbia by May 2011, avoiding the need to amend the consent decrees requiring issuance of those TMDLs by May 1, 2011 and May 31, 2011, respectively.

Thank you, in advance, for your consideration in this request. If you have any questions, please contact me at (202) 371-6364 or susan.bodine@btlaw.com.

Sincerely,



Susan Parker Bodine

cc: Peter Silva, EPA
Larry Elworth, EPA
Ephraim King, EPA
Jim Laity, OMB
Ann Mills, USDA
Members, Senate Committee on Agriculture, Nutrition & Forestry
Members, House Committee on Agriculture